59 Box 16 - JGR/(Department of Justice) DOJ Daily Reports (2) - Roberts, John G.: Files SERIES I: Subject File

THE WHITE HOUSE
WASHINGTON 8/17/84

TO: John Roberts

FROM: *Richard A. Hauser*
Deputy Counsel to the President

FYI: X

COMMENT: _____

ACTION: _____

U.S. Department of Justice
Office of the Deputy Attorney General

Associate Deputy Attorney General

Washington, D.C. 20530

August 17, 1984

MEMORANDUM FOR: Honorable Richard A. Hauser
Deputy Counsel to the President
The White House

FROM: Roger Clegg RC
Associate Deputy Attorney General

SUBJECT: Chicago Desegregation Case

Here are some background materials on our filing today in the Chicago desegregation case. I have talked with John Roberts about this.

Attachments

BACKGROUND
ON
UNITED STATES v. CHICAGO BOARD OF EDUCATION

Event: On Friday, August 17, the Department of Justice will ask the Seventh Circuit Court of Appeals to "stay" (i.e., suspend until the appellate court decides the case) a district court order requiring the United States to, among other things, provide the Chicago Board of Education with $103 million for the forthcoming school year and propose legislation ensuring that Chicago receives at least $103 million in future years. This money will be used to fund a desegregation program for Chicago's public schools. We will simultaneously appeal the case to have the district court order overturned in its entirety. Civil rights groups and the City of Chicago may criticize us for this.

I. Facts: On August 13, 1984, District Judge Shadur in Chicago entered an order which imposes a variety of substantial obligations upon the United States. The underlying desegregation lawsuit was settled in 1980 by a consent decree between the United States and the Chicago Board of Education. One provision of that consent decree required both the United States and Chicago to "make every good faith effort to find and provide every available form of financial resources adequate for the implementation of the desegregation plan."

The district judge has concluded that this "good faith effort" provision now requires the United States to do a number of things. The most noteworthy are these:

(1) Give Chicago $103.858 million for this school year and, in any event, $29 million from the Department of Education by Wednesday, August 22nd.

(2) Propose and support legislation which will ensure Chicago gets at least $103.858 million for this and subsequent school years.

(3) Oppose legislation which would keep Chicago from getting at least this much money each year.

(4) Require all parts of the Executive Branch to look for money for Chicago.

II. Position of the U.S.: The district court's unprecedented and intrusive order is an egregious violation of the doctrine of separation of powers, impermissibly interferes with relations between the Executive and Legislative Branches of the Federal Government and, by judicial fiat, redirects to Chicago funds that the Secretary of Education had already allocated to other needy

school districts to support local education and desegregation efforts. This irreparable injury to the United States Government and local school districts should be preempted by the Court of Appeals. It is entirely unreasonable to read the consent decree as broadly as the district court judge here did.

III. Relationship to Administration Philosophy: The Administration has consistently stressed that courts should not engage in "judicial activism" that impermissibly interferes with the legislative and executive functions of Government. Our opposition to the district court's attempt to restrain the President from exercising his most basic and exclusive constitutional duties is consistent with this policy.

IV. Anticipated Criticisms and Planned Department of Justice Responses:

Criticism: The Reagan Administration is attempting to undermine Chicago's desegregation program.

Response: The Administration will not allow a federal judge to dictate to the President how to make the funding decisions entrusted to his discretion or how to conduct his relations with Congress. Chicago is completely free to fulfill its responsibility to desegregate its schools and the Administration supports these efforts. We do not believe, however, that a federal judge can require taxpayers across the country to fund this program, at the expense of other worthy education and desegregation activities in other communities.

Criticism: The Reagan Administration is reneging on a legal commitment entered into by a prior Administration.

Response: Wrong. The consent decree does not commit the United States to act as an "insurer" for Chicago, requiring that the Federal Government provide all desegregation funds that Chicago is either unwilling or unable to raise in order to cure its own prior segregation. Nor did the decree "contract away" the President's right and obligation to perform his constitutional duties. The context of the decree establishes that the district judge's interpretation of its language is clearly erroneous and would render the decree unconstitutional.

V. Talking Points:

° The district court's interpretation of the language in the decree is simply wrong.

- The district court's action is an unprecedented usurpation of the functions entrusted to the Executive Branch.

- The district court's order would shift the lion's share of federal desegregation and education funds to Chicago at the expense of other needy school districts.

- The Administration fully supports Chicago's desegregation efforts but does not believe that a federal judge can unilaterally require other federal taxpayers to foot the bill for them.

THE WHITE HOUSE
WASHINGTON

8/20

TO: John Roberts

FROM: *Richard A. Hauser*
Deputy Counsel to the President

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U.S. Department of Justice
Office of the Deputy Attorney General

Associate Deputy Attorney General

Washington, D.C. 20530

August 17, 1984

MEMORANDUM FOR: Honorable Richard A. Hauser
Deputy Counsel to the President
The White House

FROM: Roger Clegg RC
Associate Deputy Attorney General

SUBJECT: CLARKSDALE BAPTIST CHURCH v. GREEN, ET AL.

Attached are some background materials on a filing we plan to make on Monday. I have talked to John Roberts about this case.

Attachments

BACKGROUND ON
CLARKSDALE BAPTIST CHURCH v. GREEN, ET AL.
(Sup. Ct. No. 83-2110)

EVENT: On Monday, August 20th, the Department of Justice is filing in the Supreme Court a response to a petition seeking review of a decision of the U.S. Court of Appeals for the District of Columbia Circuit. Clarksdale Baptist Church -- which may be supported in this matter by Congressman Trent Lott -- wants the Supreme Court to rule that the Court of Appeals has wrongfully failed to exclude it from the scope of a particular injunction. In certain cases, this injunction bars tax-exempt treatment in the absence of evidence of nondiscrimination on racial grounds. It will be the position of the Department, however, that since there has not yet been any denial of tax-exempt status, it would be premature for the Supreme Court to hear this case.

FACTS: In 1976, a group of parents of black children attending public schools in Mississippi sought and obtained a court order involving the Internal Revenue Service's policy of denying tax-exempt treatment to racially discriminatory private schools. The order emphasized implementation of the policy against schools that had been adjudicated discriminatory in other proceedings, and schools that had been formed or expanded while nearby public schools were undergoing desegregation. A school operated by the Clarksdale Baptist Church fell into the latter category, which meant that, to retain its tax-exempt status, the school would have to demonstrate by "clear and convincing evidence" that it was not racially discriminatory. The school instead took the position that as a religious school it had complete immunity and should not be required to respond to the inquiries that the IRS had addressed to it. Proceedings were stayed pending decision in the Bob Jones University case, in which the University claimed the same immunity based upon its religious orientation. The immunity was, however, disallowed by the Supreme Court in its Bob Jones decision.

Following the Bob Jones decision, the District Court and the Court of Appeals have rejected the Clarksdale claim for complete immunity, but there has still been no ruling on its tax exemption. Congress has provided a special method of court proceeding for organizations claiming tax exemption if that exemption is denied by the IRS, and the Supreme Court has held that such organizations cannot circumvent such a proceeding by an anticipatory suit against the Commissioner.

The New York Times

DATE: 8-20-84
PAGE: B7

U.S. Appeals Integration Case

CHICAGO, Aug. 19 (AP) — The Justice Department plans to appeal a Federal district judge's order that the Government turn over $28.75 million in desegregation money to the Chicago Board of Education.

The action, announced Friday, was denounced by Robert Howard, an attorney for the Board of Education. He warned that vital programs would be cut at the city's most deprived schools if the Department of Education refused to distribute the money.

The Justice Department asked the United States Court of Appeals for the Seventh Circuit to stay the judge's order until the appeal was resolved.

On Aug. 10 Judge Milton I. Shadur ordered the Government to turn the money over to the board and criticized the Government for breaking its promise to help the board pay for desegregation programs in Chicago schools.

In Washington, Mark T. Sheehan, a spokesman for the Justice Department, said: "Judge Shadur's order is so broad-ranging that it concerns far more than the civil rights division itself. It seeks to compel the executive branch in its dealings with Congress over the budget and appears to invade the powers of the President and raise serious questions of the separation of powers."

ASSOCIATE DEPUTY ATTORNEY GENERAL
WASHINGTON

August 23, 1984

MEMORANDUM FOR: John G. Roberts, Jr.
Associate Counsel to the
President

FROM: Roger Clegg RC
Associate Deputy Attorney
General

Per our conversation.

Attachment

No. 84-2405

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

BOARD OF EDUCATION OF THE CITY OF CHICAGO,

Defendant-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 84-2405

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

BOARD OF EDUCATION OF THE CITY OF CHICAGO,

Defendant-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES

QUESTIONS PRESENTED

1. Whether the district court erred in interpreting paragraph 15.1 of the Consent Decree to require that the United States:

A. engage in a wide range of lobbying and other legislative activity in order to secure money from Congress especially for the Board;

STATEMENT OF THE CASE

A. Procedural history

This case is on appeal after a hearing in the district court on remand from this Court's judgment of September 9, 1983 (United States v. Board of Educ. of City of Chicago, 717 F.2d 378).

On September 24, 1980, the United States filed its Complaint, together with a proffered Consent Decree, in this case (App. 1-29), 1/ alleging that the Chicago Board of Education ("Board") had established and maintained racial and ethnic segregation of students in the City of Chicago public schools in violation of the Fourteenth Amendment and Titles IV and VI of the Civil Rights Act of 1964 (id. at 1, 4-6). The Consent Decree, entered by the district court the same day, required the Board to develop a plan to desegregate the schools and to remedy the effects of past segregation of black and Hispanic students (App. 12-27). The Decree also provided, in ¶ 15.1, that (App. 20):

> Each party is obligated to make every good faith effort to find and provide every available form of financial resources adequate for the implementation of the desegregation plan.

The court approved on January 6, 1983, the desegregation plan formulated by the Board (United States v. Board of Educ. of City of Chicago, 554 F. Supp. 912 (N.D. Ill. 1983)). On May 31, 1983, the Board filed a "Petition * * * for an Order Directing

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1/ The designation "App." refers to the Appendix, and the designation "Br. App." refers to the separately bound Brief Appendix; both are being filed with this Brief.

plan. The court calculated that the Board's unmet needs totalled $103.858 million, which the United States was obliged to pay.

On June 26, 1984, pursuant to the district court's direction (Docket p. 31), the United States filed a report to the court of the steps it had taken and planned to take to "find and provide" funds for the Board's desegregation plan. The Board, meanwhile, twice moved, and was twice granted permission to delay, for a total of six weeks, submission of a proposed remedial order (see Appendix B to the United States' Motion for a Stay Pending Appeal, filed in this Court on August 17, 1984).

On August 7, 1984, the Board filed a proposed remedial order. The district court held a hearing on August 10, 1984, and on August 13, 1984, entered the Order from which the present appeal is taken (Br. App. 266-284). Because the Order stated (id. at 283, ¶ 20) the district court's view that "[t]here is no occasion for the stay of any portion [thereof] pending any appeal by the United States," the United States filed a Motion for Stay Pending Appeal directly in this Court on August 17, 1984. On August 20, 1984, this Court granted the stay motion and established an expedited briefing schedule.

B. Facts

1. Background

Chicago's Board operates the third largest public school system in the United States, comprising over 450,000 students of whom, as of 1980-1981, 60.8% were black and 18.4% were Hispanic

rather than undertaking fund termination proceedings, 5/ to refer the matter to the Department of Justice for appropriate enforcement proceedings (U.S. Ex. 1, Doc. 33 at 9-10).

2. Negotiation of the Consent Decree

On April 21, 1980, the Attorney General notified the Board that the United States was prepared to file suit unless the Board would agree to develop and implement a comprehensive desegregation plan (U.S. Ex. 1, Doc. 27 (Notice Letter)). Representatives of the Board and the Department of Justice negotiated over a period of several months before reaching agreement (see U.S. Ex. 1, Doc. 16, 17, 18, 20, 21, 22, 23b). Throughout these negotiations, the Board's principal concern was that it retain eligibility for the millions of dollars in federal financial assistance it was already receiving, and that it be granted priority consideration for what-

5/ Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin in programs and activities receiving federal financial assistance. It provides for alternative means of enforcement, one of which is termination of the assistance. Accordingly, the finding of noncompliance by HEW potentially jeopardized all of the Board's federal assistance. It is undisputed that Chicago was receiving a great deal of such assistance; in Fiscal Year ("FY") 1980, it amounted to more than $80 million in funds from the Department of Education (Report of the United States of July 15, 1983, docket no. 280, p. 15). The record also reflects that the Board received approximately $90 million for use in school year 1983-1984 in the form of ECIA block grants; Bilingual Education funds; Vocational Education Act funds; and funds granted pursuant to Impact Aid, "Follow Through," and assistance to handicapped children. See Stipulations (filed with pre-trial order) nos. 209, 210, 338-343. Citations to the relevant statutes appear in the Report, pp. 14-15.

> Despite the temptation to dangle the prospect of additional federal funds before a financially strapped school board to induce settlement, it remains our conviction that Chicago must agree to come into compliance with the law on the basis of the merits of the proposed suit and not in return for financial assistance.

The government was willing, however, to assist the Board in finding and qualifying for available federal funding for a desegregation plan, to be developed in accord with mutually agreeable guidelines eventually set forth in the Consent Decree (U.S. Ex. 1, Docs. 22, 27, 37). The record reflects that Mr. Days hoped, at the time, that the government could assist the Board in finding ESAA funds and funds from federal grants intended for compensatory educational programs (id. at Doc. 37, pp. 6-7). 7/ But, as the Parties have stipulated, the United States refused to agree to any commitment of federal financial support "specific as to form and amount * * * in the context of the Consent Decree, because there was no way to anticipate the nature and costs of the Board's Plan, the amount and sources of Government funding, or a variety of other matters" (Br. App. 9). Accordingly, it was agreed in ¶ 15.1 of the Consent Decree that each party would be "obligated to make every good faith effort to find and provide

7/ Additionally, Mr. Days hoped that in addition to funds that could be provided directly to the Board under such programs, the process of desegregation could be assisted by a coordinated approach to other federal programs in Chicago (e.g., housing, transportation). (See U.S. Ex. 1, Doc. 37 at 3-6; see also Docs. 8, 10, 13, 16, 39). This expectation was built into ¶ II(1) of the Consent Decree (App. 22). Other, more specific provisions concerning timing of the Board's future applications for ESAA funds were also set out (Attachment A to Consent Decree, App. 29).

Plan, filed November 10, 1983 (Docket No. 365), and the July 26, 1984, Report to the district court set out in detail the assistance the United States has made available to the Board since the formulation of the Plan. 9/ Only the grants received after entry of the Consent Decree are reviewed here.

In April 1981 the United States and the Board jointly moved the district court to hold the Board in "interim compliance," and the motion was granted (docket no. 35). This paved the way for approval of an "out-of-cycle" ESAA grant for $1.8 million (Br. App. 117).

In Fiscal Year ("FY") 1980 and FY 1981, the Board also received awards, under Title IV, of $422,800 and $298,639. These were the largest grants awarded to local education agencies in those years (ibid.). Also in 1981, Northeastern Illinois University received a $248,604 Title IV grant for the sole purpose of conducting a training institute for Chicago school personnel (June 24, 1983, Affidavit of Jack A. Simms). In FY 1983, the Illinois Office of Education and the desegregation assistance centers at Indiana University and the University of Wisconsin-Milwaukee received $300,000 for Title IV services to the Board (July 15, 1983 Report at 23). In FY 1984, Title IV grantees that provide services to the Board were given priority so that they would be able to offer $426,523 in services to the Board that year (Report of June 26, 1984 at 6).

9/ See, particularly, the tables at pp. 14-15 of the July 15, 1983, Report and note 5, supra, of the Statement, for updated figures on block grants and categorical assistance.

under Title IV of the Civil Rights Act of 1964 for desegregation related purposes (42 U.S.C. 2000c-4), and at least some of the funds in the Secretary's Discretionary Fund (20 U.S.C. 3851(a)). 10/ Additionally, the court found that the FY 1983 Title IV funds were appropriated for five other programs into an account called "Special Programs and Populations." While some of those funds were earmarked for certain existing programs, the court determined that much of the money could be reprogrammed either to Title IV or to the Discretionary Fund -- programs for which the Board was theoretically eligible (id. at 284). The Secretary's statutory interpretations and policy choices, to the extent that they made funds unavailable to Chicago, the court held, were themselves violations of ¶ 15.1 of the Consent Decree (id. at 280, 282).

Second, the court noted that in 1981, the President had adopted a policy of phasing out categorical grants and grants to individual school districts in favor of block grants to States. The court regarded this policy as a violation of the Consent Decree. Similarly, policy decisions of the Executive to reduce the total amount of federal financial assistance available to school districts, not to request larger appropriations from the Congress for Title IV or the Discretionary Fund, and to phase out ESAA were held by the Court to violate ¶ 15.1 of the Consent

10/ The Secretary's Discretionary Fund is a small portion of the Educational Consolidation and Improvement Act, 20 U.S.C. 3801, et seq. (ECIA). Most of the ECIA is dedicated to block grants.

funds already obligated, and directed the government to take steps to prevent the lapse of certain "excess" funds which might eventually be put to the use of the Board's desegregation plan (id. at 289). 12/ In addition, the court enjoined the government to take affirmative steps, both administrative and legislative, to find and provide additional funds for Chicago (id. at 288).

6. The First Appeal (717 F.2d 378)

This Court, on the first appeal, agreed with the district court that ¶ 15.1 imposes a substantial obligation on the government to provide available funds to the Board (717 F.2d at 383), and that this obligation involves more than rendering procedural assistance (ibid.). This Court hastened to point out, however, that substantial constitutional issues would be raised by construing the Consent Decree as an enforceable promise to shape Executive policy and priorities to fit the needs of a particular school district (ibid.). Accordingly, this Court affirmed the district court's judgment that the United States had breached the Consent Decree to the extent that there were funds available and the government had refused to give any of them to Chicago (ibid.). This Court also held that while a "temporary" freeze on the Secretary's ability to expend certain funds was appropriate, the district court should have allowed the United States an opportunity to formulate a remedial proposal rather than subjecting a co-equal branch of government to a detailed remedial

12/ As indicated earlier, that Order was modified a number of times prior to August 13, 1984. See note 2, supra.

Yates bill fully satisfied any obligation that the United States might have under ¶ 15.1 of the Decree and that none of the frozen funds were even arguably "available" (docket nos. 363-364). The district court denied that motion (docket no. 379).

8. The Hearing on Remand

The remand hearing took place in March 1984. Consistent with the district court's earlier determination that the United States' obligation under the Consent Decree was to be measured by the Board's unmet need, the Board introduced its estimate as to the cost of the educational components of the Plan for a single school year: $108,785,468 (see Board's Exhibit No. 28). This figure underwent some revision in the course of trial (see Board's Exhibit 117 and Br. App. 83-90), and was further modified by the court after evaluation of the Board's contentions 14/ (see generally Br. App. 94-101). The total, $103,858,642, was found by the court to represent the Board's unmet need (Br. App. 82). 15/

C. The District Court's Findings and Conclusions on Remand

On June 8, 1984, the district court entered its Findings of Fact and Conclusions of Law.

1. First, the district court concluded that argument on the following findings was foreclosed by this Court's previous

14/ The table at Br. App. 83 already incorporates deletions made by the district court, e.g., the "Magnet Schools" entry reflects the court's deletion of the proposed residential high school estimated to cost $9 million.

15/ The court's findings and conclusions are discussed in greater detail in Part C of this Statement.

claimed to be unable to afford were in fact in operation and being paid for by the Board's own funds (Br. App. 54-55).

The court reasoned that ¶ 15.1 represents a "mutual" obligation -- joint and several -- akin to that of joint obligors (Br. App. 183-186). Thus, the United States' "share" is equal to that portion of approved "desegregation" expenses which the Board cannot afford. On the assumption that the Board's $67 million desegregation budget for 1984-1985 would cover none of the educational components described in the Plan, the court concluded that their entire cost, $103.858 million, represented the United States' "share" (Br. App. 82). 17/

3. In determining the United States' present remedial obligation, the court began with the premise that in formulating ¶ 15.1, the parties contemplated that the Executive Branch would use both its administrative and its political powers to secure funds for Chicago's Plan (Br. App. 248-251, 254-257). The court rejected all arguments that -- even apart from the Weicker Amendment -- the possible uses of the frozen funds were circumscribed by committee directives, regulations, and permissible exercises of Secretarial discretion (Br. App. 139-159, 195-215). As for

17/ In this connection, the court rejected any suggestion that the United States' "share" was necessarily limited either by the maximum amount the Board might have expected, at the time the Consent Decree was signed, under the old ESAA program, or by the $14.6 million figure of the previous decision, or by the Board's prior $40 million estimates (see Br. App. 186-190). The court also rejected the contention that in passing the Yates bill and the Weicker Amendment, Congress intended to place a $20 million limit on what Chicago would be given from federal FY 1983 and FY 1984 funds (id. at 216-219).

Amendment, though it did not render funds unavailable, nonetheless demonstrated, the court held, the Secretary's "bad faith." In addition, the court found that the government acted in bad faith by continuing to pursue its policy of declining to ask Congress to fund programs in which the Board would be eligible to participate, and of refusing to seek reprogramming or congressional reappropriation of funds intended for other programs, but which had not been used or had lapsed.

As in the first decision, the court added that even if one were to construe the Decree as not promising positive legislative initiatives, the government's negative initiatives showed bad faith and would warrant correction in an affirmative remedial order that required the Secretary to request appropriations from Congress. No problem of Separation of Powers would be created by such a decree, the court held (Br. App. 251-257), for the Executive Branch is capable of binding itself to forego some of its discretion, and there is nothing about a "best efforts" clause that renders such an agreement impossible to enforce.

In light of the United States' bad faith conduct, the court held that the United States' duty is not limited to turning over "available" funds to the Board, but rather that the United States must now, one way or another, secure for and provide to the Board $103.858 million in federal funds (Br. App. 241-251, 259-260).

D. The Remedial Order

On August 13, 1984, the district court entered its Remedial

Discretionary Fund, and one half -- $11.775 million -- of the remaining Title IV funds by August 22, 1984 (ibid.).

The Order requires the United States to formulate a plan by October 1 of each year to come up with the rest of the $103.858 million for this year and a similar amount for each school year for the foreseeable future (see ¶¶ 15 and 17 Br. App. 277-282). The steps the United States must take include:

(1) identifying funds in any agency appropriation which may be provided to the Board "without further congressional action" including the Department of Education's Salaries and expenses subaccount and the Office for Civil Rights and "Gift and Bequest" accounts (¶¶ 10, 15(a) Br. App. 273, 278);

(2) identifying funds wholly unrelated to desegregation assistance in any agency appropriation that will lapse at the end of the fiscal year and proposing legislation seeking to have these funds reappropriated by Congress to be provided to the Board (¶¶ 10, 15(b) Br. App. 273, 278-279);

(3) requesting supplemental and new appropriations for the Department of Education that will be specifically earmarked for the Board's desegregation efforts (¶¶ 10, 15(e) Br. App. 273, 279);

(4) identifying and supporting any legislative initiatives that would provide funds for the Board (¶ 15(c), (d) Br. App. 279); and

government should not lightly be interpreted to surrender important constitutional responsibilities or commit the United States to an obligation more draconian than could have been imposed after a trial. Id. at 9-15.

Nonetheless, the district court construed ¶ 15.1 in a manner that, if upheld on appeal, would constitute an unprecedented intrusion by the Judiciary into the constitutionally assigned functions of the two other political branches. The Order purports to bind immediately the President's exercise of his power to recommend or oppose legislative measures as he deems "necessary and expedient." Congress is consequently deprived of the judgment of the Executive Branch regarding the ordering of national priorities, and the American people are deprived of the interplay of information and views between the two democratically elected branches. Such a reading of ¶ 15.1 violates a basic principle of construction by assuming that the Attorney General bargained away the President's constitutional powers and obligations. Not only could the Attorney General not make such a commitment, but, even assuming such a construction, the courts could not enforce it.

Moreover, because the district court concluded that the United States must effectively insure the Board against its inability to pay for the plan to remedy the Board's past unconstitutional actions, other worthy grantees are deprived of their funds, notwithstanding Congress' and the Executive's determination of their eligibility. The order requiring federal funding of the plan to the extent that the Board is unable to do so (an

amount that exceeds $103 million for this year alone) contravenes the legislative purpose underlying the various funding statutes in question and compels the Secretary to act in an unauthorized manner.

The district court's order disregards the fundamental doctrine of the Separation of Powers, usurps powers constitutionally committed to the Executive, and chills the normal interchange between the political branches. Equally mistaken is the district court's apparent belief that its finding of prior violations of the Consent Decree expands judicial power to order relief beyond the parties' original undertaking and, indeed, beyond constitutional bounds.

The decree as read by the district court is unenforceable. If the United States entered such an unconscionable "bargain," it would be the district court's duty to call upon the parties to renegotiate ¶ 15.1 and, failing that, to declare the decree rescinded and set the case down for trial. Correctly read, however, ¶ 15.1 limits the government's obligation to seeking and providing an equitable share of all forms of available assistance, i.e., funds appropriated by Congress for desegregation implementation and for which the Board is eligible under applicable criteria. Such a very real obligation provides Chicago its fair share of available federal funds without denying assistance to other worthy applicants. It is an obligation that the United States has faithfully fulfilled.

This Court did not further define the scope of the United States' commitment under ¶ 15.1. Of central importance here, the Court did not decide what funds should be deemed "available" for purposes of ¶ 15.1. Nor did it decide what portion of any available form of assistance the United States was obligated to provide. Instead, this Court left the resolution of these questions to the district court on remand. The principal issue raised by this appeal is whether the district court properly resolved these questions.

We submit that, for purposes of ¶ 15.1, "available" forms of financial resources can only mean funding sources that, through the appropriation process, have been designated by Congress for implementation of desegregation and for which the Board is eligible under the general criteria established by the funding agency. 22/ By

22/ It goes without saying that in the "effort to find and provide every available form of financial resources," the parties to the Decree remain subject to the constitutional and statutory appropriations process. It is fundamental constitutional law that money may not be paid from the Treasury except pursuant to congressional appropriation (Art. I, Section 9 of the U.S. Constitution). An appropriations act, by its nature, limits the availability of funds for obligation by the Executive to specified purposes, time, and amount. U.S. General Accounting Office, Principles of Federal Appropriations Law 3-2 (1982). Only in this sense -- in accordance with the purposes specified by Congress in appropriations acts -- can financial resources be said to be "available." See ibid. No action by the Executive in the legislative sphere -- supporting or opposing legislation -- can have any bearing on efforts to find or provide available funds. Such actions may help to influence what funds will be available; however, the United States' obligation under ¶ 15.1 relates only to the subsequent question of how funds, once made "available" through congressional appropriation, are identified and disbursed.

[Footnote continued]

fall determined by the district court to exceed $103 million for this year alone. While the expense of litigating this case would have been substantial, it could have been done for considerably less than $103 million. This monetary obligation, however, pales next to the "important public interests" detailed below, bargained away by the Attorney General under the district court's reading of the Consent Decree. In the words of this Court in Alliance (Slip op. 12): "[A] proper decree formulated after trial would not have been more Draconian" to the United States. Indeed, in contrast to the party alignment in Alliance, the United States is the plaintiff in this case, and was not at risk of having relief of any kind entered against it had the case gone to trial, let alone extreme measures like those ordered by the district court under the Consent Decree. 23/ The principles of consent decree interpretation articulated in Alliance -- a case in which the government was a defendant accused of violating the plaintiff's

23/ In contrast, the remedial burden imposed on the Board under the Consent Decree was less onerous than that which could have been imposed by the court after full litigation. Chicago's desegregation plan, developed by the Board, requires no mandatory transportation, defines schools as "desegregated" if they have a 30% minority and 30% white student population, and measures desegregation with respect to "minorities" only, rather than with respect to blacks and Hispanics considered separately. See United States v. Board of Educ. of City of Chicago, 554 F. Supp. 912 (1983). These and other provisions of the plan were vigorously criticized by commenting organizations, such as the NAACP and Urban League, as inadequate and were acknowledged by the district court to be less rigorous and sweeping than other available desegregation techniques. Id. at 913 n. 1, 918-927.

to propose legislation that he deems necessary and expedient, and on his constitutional authority under Art. 1, §7 to veto legislation. Accordingly, the district court's order implicates almost all of the concerns that have animated discussions of the Separation of Powers doctrine. These concerns include the political question doctrine, Baker v. Carr, 369 U.S. 186, 222 (1962); the recognition that the Judiciary may not interfere with duties committed to executive discretion, either by the Constitution or by statute, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 165-66 (1803); and the need to exercise restraint when judicial action would undermine the respect due a co-equal branch, or would interfere with sensitive responsibilities of the President, Nixon v. Fitzgerald, 457 U.S. 731, 753-54, 756 (1982), or when the question to be resolved is peculiarly unsuitable for answer by the judiciary. Alliance, supra, slip op. at 20.

The most far-reaching aspect of the court's construction of the consent decree is its requirement that the President and his delegates undertake a variety of political activities, including proposing and supporting certain legislation and opposing other measures, in order to secure from Congress additional money for the Board. 25/ The court's interpretation of ¶ 15.1, by regulating the content of the President's communications with Congress and restricting the political discourse that is vital to

25/ These activities are described in detail at pp. 21-24, supra.

neither expressly nor implicitly refers.

Further, the district court's order mandates not only what the President must say in his dialogue with the Congress, and the degree of enthusiasm with which he must say it, but also what he may not say. By prohibiting the President from opposing certain legislation, even if he does not believe it to be in the Nation's best interest, the district court intrudes upon the President's constitutional right to veto bills he opposes. 26/ U.S. Const., Art. I, §7. The Attorney General lacks authority to bind the President to such an arrangement, and the court could not enforce such an arrangement in any event. (See p. 65, infra.) To the extent that the district court read into the consent decree, by implication, any such constraints on the President's constitutional powers, its strained interpretation must give way to one more reasoned -- one that does not seek to invade the exclusive province of the President -- if the decree is to survive.

As this Court said in Alliance, supra (Slip op. at 20):

> A due regard for the separation of powers, the flexibility of equity, the ambiguity of the decree, ... the sensitivity and importance of the subject matter, and the limitations of judicial competence argues against precipitating a premature

26/ Indeed, the district court's requirement that the Executive Branch oppose any legislation designed to decrease funds for the Board would appear, on its face, to require the President to support any bill containing such funding, regardless of the presence in the bill of other, unrelated provisions that the President regards as objectionable and would otherwise veto.

of Education without regard to its purpose or any limitations on administrative discretion imposed by legislation, implementing regulations, or prudential administrative practices (Br. App. 195-215). It thus viewed the failure of the Secretary to include the Board in certain fund disbursement programs, to allocate additional funds to Chicago even at the expense of other grantees, and to convert appropriations from their intended purposes by whatever administrative or legislative steps might be required, as evidence that the United States failed to carry out its consent decree obligation. Ibid.

With respect to the amount of the government's obligation, the district court reached its conclusion -- that the government was required to furnish all sums which the Board needed but did not have -- by two lines of reasoning. First, as an interpretive matter, it simply construed ¶ 15.1 as meaning that the United States had agreed to finance any shortfall between the Board's desegregation budget and its needs. (Id. at 12-16, 183-185). As an alternative, the district court developed a sort of penalty doctrine, i.e., since the United States had defaulted on its commitment to find and provide available resources, it must now move beyond mere "availability" and fund the entire desegregation program to whatever extent the Board's resources are insufficient. (Id. at 241-243).

its needs. The court was unconcerned that its order ignored the regular appropriations process, 28/ contravened the purpose for which funds were appropriated, and impinged on other legitimate funding responsibilities of the federal government. Instead, it treated the United States as an insurer, underwriting the financial responsibility for the Chicago desegregation plan to the extent that the Board could not meet costs.

There is no record support for the proposition that the Attorney General entered into an agreement to write a blank check

28/ For example, paragraph 15(b) of the district court's Remedial Order requires the United States to identify for possible congressional reappropriation all "excess funds" in any agency. The district court defines such "excess funds" to include funds which are expected to lapse, and specifically directs the Executive Branch to identify and report by September 15, 1984, "any funds that may lapse in any agency account at the end of fiscal year 1984," with a similar September 15 reporting requirement for succeeding fiscal years (Br. App. 278). Even putting aside the extraordinary government-wide administrative burden this requirement places on the United States (there are, for example, 1200 separate appropriations accounts, many of which are subdivided into major activities), the requirement cannot possibly achieve its purpose of obtaining such reappropriations before the end of each fiscal year without fundamentally changing the federal budget process. Because the fiscal year ends on September 30 of each year, a September 15 report identifying funds expected to lapse in that fiscal year would be at best a forecast. Such a forecast, however, would be highly unreliable -- far too unreliable to serve as a basis for proposed reappropriation legislation -- because funding decisions throughout September would cause any estimate to fluctuate daily. Moreover, any request to the Congress to reappropriate such estimated funds would require prompt review and approval by various congressional subcommittees, an unusual and cumbersome procedure which would raise controversial budget issues, and which would not likely be completed by the end of the fiscal year.

More particularly, the district court concluded that the following funds "have been and currently are 'available' to the United States within the meaning of Section 15.1" (Br. App. 203): (1) "[a]ll remaining fiscal year 1983 Title IV funds and all fiscal year 1984 Title IV funds" (ibid.), (2) "the nonstatutorily directed" portion of the Secretary's Discretionary Fund (id. at 208), (3) the funds in the Special Programs and Populations account other than those allocated to Title IV (id. at 212), and (4) fiscal year 1984 funds in the Department of Education's Salaries and Expenses and Office for Civil Rights subaccounts and any Gift and Bequest account funds which have not been committed for other purposes and are not reasonably necessary for other Department functions (id. at 212-214); (¶¶ 14(a), 14(b), 15(a), 16, 17, Br. App. 276-278, 281).

To be sure, the referenced statutes vest broad discretion in the Secretary of Education with regard to their implementation. But that discretion is limited by Congress' legislative purpose underlying its appropriation decision. Plainly, the Secretary cannot as an exercise of his discretion allocate to a single grantee all the funds appropriated under a statute to assist a number of grantees. How much goes to each grantee and in what increments is clearly a determination appropriately left to the Secretary, and within that framework he may undoubtedly decide, as circumstances warrant, that one or more potential grantees shall

and demonstration projects, and technical assistance programs." S. Rep. No. 97-139, 97th Cong., 1st Sess. 897 (1981). For FY 1984 the Secretary was "directed" in House and Senate reports to use specified sums to fund the National Diffusion Network 29/ and law related education projects 30/ (H.R. Rep. No. 98-357, 98th Cong., 1st Sess. 110 (1983); see also H.R. Conf. Rep. No. 98-422, 98th Cong., 1st Sess. 21 (1983)). The committee stated that the remaining funds were to be used

> to conduct evaluations and studies of the implementation and impact of chapter 2; and to support other activities of national significance that address the Secretary's priorities including special initiatives to follow up on the recommendations of the National Commission on Excellence in Education.

S. Rep. No. 98-247, supra, at 129.

Significantly, however, Congress intended no part of the Secretary's Discretionary Fund to be utilized for operational expenses of desegregation. Those costs were, consistent with

29/ The National Diffusion Network is a program designed to identify, disseminate information about, and replicate programs which have been particularly successful in meeting the educational needs of educationally deprived and other children throughout the United States. See Affidavit of Lee E. Wickline, Appendix C to United States' Motion for a Stay Pending Appeal, pp. 379-385.

30/ The Law Related Education Program "is designed to provide persons with knowledge and skills pertaining to the law, the legal process, the legal system, and the fundamental principles and values on which these are based." The purpose of the program is to enable children, youth, and adults to become more informed citizens (49 Fed. Reg. 23595 (June 6, 1984)).

that Congress divorced this Fund from the block grant statute precisely to make it available for enumerated purposes other than such operational expenses. 33/

Accordingly, the district court's order that the Secretary provide $17 million in Discretionary Fund appropriations to the Board for use to defray operational expenses runs directly contrary to the express will of Congress to use those funds for programs outlined in legislative reports. If such a commitment had in fact been contained in ¶ 15.1, it certainly would have been an improvident promise that the United States could not have fulfilled without impermissibly disregarding the very purpose for the appropriation. Executive agencies are not "free to ignore clearly expressed legislative history applicable to the use of appropriated funds. They ignore such expressions of intent at the peril of strained relations with the Congress * * * [and, therefore, have] a practical duty to abide by such expressions." In re LTV Aerospace Corp., 55 Comp. Gen. 307, 325-326 (1975).

33/ Further evidence of this legislative design is seen in the appropriation decision tied to the Discretionary Fund. The total Discretionary Fund appropriation for fiscal year 1984, as in fiscal year 1983, is $28,765,000, out of which $11,475,000 must be used to fund three statutorily mandated programs, S. Rep. No. 98-247, 98th Cong., 1st Sess. 129 (1983). An additional $11.7 million of the Discretionary Fund is devoted to funding the programs directed by Congress in House and Senate reports. Clearly, the small amount of money remaining (less than $6 million) could not have been considered by Congress as an appropriation for operational support for local desegregation activities on a nationwide basis, and indeed all available evidence points precisely in the opposite direction.

advisory services authorized by Title IV are to support state educational agency projects and desegregation assistance centers. 35/

No discernible impact was felt by Chicago as a result of this procedural change. The Board remains eligible for essentially the same measure of assistance under Title IV as in the years prior to 1982. 36/ For fiscal year 1984, pursuant to its obligation under ¶ 15.1, the Department of Education has provided a competitive priority under applicable regulations (34 C.F.R. 270.20(b);

35/ H.R. Rep. No. 97-894, 97th Cong., 2d Sess. 99 (1982); S. Rep. No. 97-680, 97th Cong., 2d Sess. 107 (1982); H.R. Rep. No. 98-357, 98th Cong., 1st Sess. 110 (1983); S. Rep. No. 98-247, 98th Cong., 1st Sess. 130 (1983).

36/ The Board received direct grants of $422,800 in fiscal year 1980 and $298,639 in fiscal year 1981, the largest awards given to local educational agencies for race desegregation in those years (Br. App. 117). Also in 1981, Northeastern Illinois University's race desegregation assistance center received a grant to provide training services to Chicago teachers, valued at $248,604 (June 24, 1983 Affidavit of Jack A. Simms). In fiscal year 1983, Title IV grantees were prepared to provide at least $300,000 in desegregation services to the Board, at its request (July 15, 1983 Report at 23). Under the statute and the regulations, 42 U.S.C. 2000c-2, 34 C.F.R. 270.32(b), a desegregation assistance center may provide services only upon request from a local educational agency. The Board made no such request for the 1983-1984 school year (Brady testimony, p. 475).

It is, in these circumstances, error as a matter of law to conclude, as did the district court, that Title IV funds in their entirety -- or even in substantial part -- are "available" to Chicago. See note 22, supra. Nor can it reasonably be maintained that Congress intended these funds to be awarded in a manner that disproportionately benefits a single grantee at the expense of the many other deserving applicants.

In the instant case, the Secretary has established criteria and found the Board eligible for services pursuant to a grant under those criteria. Moreover, the statutes and regulations outlining competition criteria were in existence at the time the Consent Decree was entered. It would transgress the bounds of permissible judicial action to order more.

3. Special Programs and Populations Account

The district court's reading of ¶ 15.1 of the Consent Decree as a commitment by the Secretary to reprogram into the Title IV account funds appropriated for other purposes within the Special Programs and Populations account suffers the same infirmity. As this Court has noted, the programs that Congress intended to be funded from the Special Programs and Populations account are "unrelated to desegregation," (717 F.2d at 381 n. 5). Thus, reprogramming in the manner suggested would effectively defeat the very purpose for which Congress appropriated the Special Programs funds in the first place. It is unreasonable

other purposes and are not reasonably necessary for other Department functions "have been and currently are 'available' to the United States within the meaning of Section 15.1" (Br. App. 212). 40/ The Salaries and Expenses and the Office for Civil Rights subaccounts are part of an account entitled Departmental Management (Pet. [Board's] Exhibits 57 at I-I24, 64, 66). Reprogramming of funds is not permitted between accounts, as it is between subaccounts or programs within a subaccount (Christensen testimony, p. 1123; Principles of Federal Appropriations Law, United States General Accounting Office, Office of General Counsel, pp. 2-28 through 2-30 (June 1982)). Therefore, none of the funds within these accounts are even arguably available to the Board without legislative action which, as we have argued supra (pp. 32-36) the district court cannot order.

40/ The district court also concluded that funds in the Gift and Bequest account have been and are "available" (Br. App. 212). There is no Gift and Bequest account, as such; what the court may be referring to is an account entitled "Contributions" in which the Department places contributions from outside sources. Such contributions may be given for restricted purposes. There are virtually no funds in that account at the present time.

> There is hereby appropriated $20,000,000 to be derived by transfer from funds available for obligation in fiscal year 1983 in the appropriation for "Guaranteed Student Loans", to remain available for obligation until September 30, 1984, to enable the Secretary of Education to comply with the consent decree entered in United States district court in the case of the United States of America against the Board of Education for the City of Chicago (80 C 5124) on September 24, 1980.

On July 29, 1983, Congressman Yates initially offered the provision as a means of carrying out the federal government's agreement with the Board in this case, and to "allow funds restricted by the Court to be distributed to school systems which would have received certain grants had the Court not acted." 129 Cong. Rec. H5990 (daily ed., July 29, 1983). The Congressman cited examples of "Follow Through" grants and state block grant funds under the ECIA affected by the district court's freeze. Id. at H5990-H5991. Congressman Conte also adverted to the problems created "throughout the country" by the freeze on expenditures of discretionary funds in elementary and secondary education. Id. at H5990 (remarks of Rep. Conte). 42/

42/ The House passed the amendment. 129 Cong. Rec. H5991 (daily ed., July 29, 1983). The Yates provision was inadvertently omitted from the Senate version of the bill, an omission corrected by Congressman Yates on August 1, 1983. 129 Cong. Rec. H6126 (daily ed., August 1, 1983). The House (ibid.) and the Senate (129 Cong. Rec. S11293) passed the provision correcting the omission, and on August 13, 1983, the President vetoed the measure. The President stated the veto was based on his "conviction that the Constitution and its process of separated powers and checks and balances does not permit the judiciary to determine spending priorities or to reallocate funds appropriated by Congress." 19 Weekly Comp. of Pres. Doc. 1133 (Aug. 13, 1983).

tion to draft language to ensure that funds other than the $20 million would not be available to fund the Decree. In response, the Department of Education provided two alternatives to the staff member.

On October 4, 1983, Senator Weicker offered the second alternative and the Senate passed it by voice vote. 129 Cong. Rec. S13506-S13507 (daily ed.). The text of that provision is as follows:

> No funds appropriated in any act to the Department of Education for fiscal year 1983 and 1984 other than those appropriated by Section 111 of Public Law 98-107 shall be available to fund the consent decree of 1980 between the United States and the Board of Education of the City of Chicago.

There was no debate on the amendment. In explaining his proposal, Senator Weicker emphasized the need to end the freeze (129 Cong. Rec. S13506-S13507 (daily ed., Oct. 4, 1983)):

> It is our understanding from the Department of Education's General Counsel, that this language is needed to unfreeze the approximately $50 million in fiscal year 1983, and an undetermined amount in fiscal year 1984, that a Chicago Federal judge has frozen in order to satisfy the Federal obligation in the desegregation case, U.S. against the Board of Education of the City of Chicago.
>
> The continuing resolution includes a provision which appropriates $20 million for this purpose from unobligated guaranteed student loan funds. My concern in offering this amendment is for those education programs which are being denied funding because their funds have been frozen pending the outcome of this case.
>
> Such programs affected are: Follow Through, women's educational equity, civil rights training,

had passed the Weicker Amendment, which he believed fulfilled the same purpose (129 Cong. Rec. H8017 (daily ed., Oct. 5, 1983)). He expressed a desire to

> free up the fiscal year 1983 funds the judge is still holding hostage in that case, and get those funds out to the many, many States that are suffering devastating impacts in their programs, like civil rights training, as a result of this judicial impoundment. 45/

The October 20, 1983, Congressional Record contains an extension of remarks by Congressman Conte concerning the Weicker

45/ The full text of his remarks follows:

> The purpose of the amendment I was considering, as well as what was done in the Senate, is to free up approximately $45 million in fiscal year 1983 education funds currently frozen by the district court in the court case. This $45 million is being held in limbo as a potential judgment fund and, as a result, a majority of States that had expected to receive these funds are encountering severe difficulties in keeping a number of programs going. The affected programs include Title IV, civil rights training, follow-through, women's educational equity, national diffusion network, and projects in the Secretary's discretionary fund.
>
> In the civil rights training program, in my State alone, 19 people are faced with losing their jobs and the same applies to programs in States across the country, from California to Florida, to New York, to Michigan to Mississippi.
>
> The intent of this amendment and of the action taken by the Senate is more or less a quid pro quo. If we are going to provide $20 million to fulfill what the Government's obligation may be in fiscal year 1983, and that has not even been finally decided yet, we should at least free up the fiscal year 1983 funds the judge is still holding hostage in that case, and get those funds out to the many, many States that are suffering devastating impacts in their programs, like civil rights training, as a result of this judicial impoundment.

those funds at the behest of the district court and at the expense of other grantees. 46/

Thus, it is clear that Congress intended its appropriated education funds to be used for the benefit of school children in Connecticut, Rhode Island, Michigan, and elsewhere throughout the country as well as in Chicago. This nationwide purpose was not expressed for the first time during debate on the Yates and Weicker provisions. That debate simply confirms the intent of Congress when the relevant legislation was enacted. No one is more aware of that broad purpose than the Executive Branch officials charged with distributing funds to deserving recipients. Under the circumstances, it strains reason to conclude that those officials would have agreed to a provision that would result in funneling the bulk of available funds to a single recipient.

46/ The district court concluded that the Weicker Amendment's language leaving the Consent Decree in "full force and effect" leaves to the Court the determination as to what portion of the previously frozen funds should be allocated to the Board (ibid.). The court stated that the provision represents a legislative determination "that the Executive Branch should regain control of the funds, after which the rights to ultimate distribution of the funds would simply be in accordance with law -- not dictated by the statute itself" (id. at 226-227). The implication of this language is that the Court (enforcing the "law" as required by the Consent Decree) and not the Secretary (distributing the funds in accordance with the requirements of the "statute") has ultimate control of the previously frozen funds. This understanding is clearly incorrect.

The Board argued, and the district court agreed (Slip op. 227-234), that our interpretation would render the Weicker Amendment unconstitutional. This contention is without merit. The district court never gave Chicago such an "interest" in the funds (e.g., by a judgment) that could render Congress' intent to make the funds available to other grant recipients a "taking" in violation of the Fifth Amendment.

B. The District Court's Findings of "Bad Faith" as a Predicate to Imposing Additional Remedial Obligations Overstep Judicial Authority and Invade the Exclusive Province of Congress and the President

Moreover, in concluding that it could impose "additional * * * burdens" (Br. App. 241; citation omitted) on the United States as a consequence of the United States' supposed "willful and bad faith violations" of the Decree (id. at 238-241), the district court overstepped the bounds of appropriate judicial inquiry and profoundly intruded into the constitutionally vested discretion of the President and into relations between him and the Congress.

As discussed above (supra at 32-35), it is within the exclusive authority of the President to propose, support, oppose, sign, or veto legislation, as he and only he deems necessary and expedient. Few concepts are so fundamental to the democratic character of our Republic as this. In concluding that the United States has "persistent[ly]" engaged in "willful and bad faith violations" of the Decree, however, the district court arrogated to itself the authority to second-guess the President's judgments on legislative policy, and has imposed severe monetary liability on the United States as a consequence of the President's exercise of his constitutional discretion. Thus, the court predicated imposition of additional burdens on the United States on, inter alia, the President's support for a proposal by Representative Conte to earmark funds (Br. App. 236, ¶ 120(a)); Executive Branch preparation of a legislative

C. The District Court Misapplied Equitable Remedial Principles in Concluding that the Purported Violations of the Consent Decree Warranted Imposing Remedial Obligations Not Contained in, or Contemplated by, the Consent Decree

The district court erred by imposing entirely new burdens on the United States in disregard of the plain language of ¶ 15.1 of the Decree. In imposing an unconditional obligation on the United States to pay the Board $103.858 million, the court required that the United States pay an amount based on the Board's statement of its need, rather than a determination of what funds are "available." Even the most expansive reading of the Consent Decree cannot support a requirement that the United States pay the Board whatever sum it needs for desegregation and cannot produce itself. The district court has attempted to justify its alteration of the terms of the Decree by stating (Conclusion of Law No. 127 Br. App. 241):

> [A] court may impose "additional consistent burdens" designed "to ensure implementation of the decree" when a party to a consent decree has failed to comply with his obligation. Brewster v. Dukakis, 675 F.2d 1, 4 (1st Cir. 1982).

The Brewster case, however, undercuts the court's position. In Brewster, private plaintiffs had entered into a consent decree with various members of the executive branch of the Commonwealth of Massachusetts. The Commonwealth defendants agreed in the Consent Decree to undertake improvements in the care and treatment of residents at a state institution for the mentally disabled, and to "use their best efforts to insure the full and timely financing of this Decree." Brewster v. Dukakis, supra,

principle of equitable relief requiring it to tailor the scope of the remedy to fit the nature of the violation. Milliken v. Bradley, 418 U.S. 717, 744 (1974); Hills v. Gautreaux, 425 U.S. 284, 293-294 (1976). Accordingly, the district court's order must be reversed. 40/

In our discussion of how ¶ 15.1 should be read, we noted that the district court's reading of the provision renders its requirements unconstitutional and beyond the power of the judiciary to enforce. Therefore, if this Court concludes that the United States has agreed in the consent decree to restrict the President unconstitutionally in his dealings with Congress (see pp. 32-35, supra) or to commit unlimited financial assistance in contravention of its legal authority (see pp. 38-42, supra), the Consent Decree must be declared invalid and unenforceable. See United States v. City of Miami, 664 F.2d 435, 441 (5th Cir. 1981) (en banc) (opinion of Rubin, J.). Because, however, only one subsection (¶ 15.1) of an extensive and otherwise unobjectionable desegregation decree would thereby be rendered unenforceable, the parties should be allowed an opportunity to re-

40/ There is also a problem of a jurisdictional nature with the Remedial Order. Certain aspects of the Order (e.g., ¶ 14 Br. App. 276-277) direct federal officials to pay a sum certain to the Board. To this extent, the Order directs the payment of funds from the public treasury based upon the Consent Decree, which is, at bottom, a contract. Thus, a district court is without jurisdiction to order such relief in an amount over $10,000 by virtue of the express provisions of 28 U.S.C. 1346(a)(2). That provision remits contract claimants seeking more than $10,000 to the Claims Court.

CERTIFICATE OF SERVICE

I hereby certify that two copies of the attached brief and one copy each of the Brief Appendix and Appellant's Appendix were served upon Board counsel Hugh R. McCombs, Jr., by hand, and upon remaining counsel listed below by regular United States mail on August 23, 1984.

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